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Supreme Court of the United States

OCTOBER TERM, 1949

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

BRIEF FOR PETITIONER, THE PENNSYLVANIA RAILROAD COMPANY

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 451

THE PENNSYLVANIA RAILROAD COMPANY, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

BRIEF FOR PETITIONER, THE PENNSYLVANIA RAILROAD COMPANY

OPINION BELOW

The Court of Claims rendered no opinion. Its order directing the entry of judgment is unreported (R. 49).

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1959 (R. 49). On August 21, 1959, the time to file a petition for a writ of certiorari was extended by order of Mr. Justice Stewart to and including October 3, 1959 (R. 50). The petition for a writ of certiorari was filed on October 2, 1959, and was granted on December 14, 1959 (R. 51). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

Is an order of the Interstate Commerce Commission, entered in a proceeding had on referral from the Court of Claims, declaring certain rates of a common carrier by rail to have been unreasonably high as applied to past shipments, a judicially reviewable "order" within the meaning of 28 U.S.C. § 1336 and 49 U.S.C. § 17(9), when the legal consequence of the order is finally to relieve a shipper of its obligation to pay the carrier for past transportation services charges computed on the basis of those rates?

STATUTES INVOLVED

Sections 1336 and 1398 of the Judicial Code (28 U.S.C. §§ 1336, 1398), Section 17(9) of the Interstate Commerce Act (49 U.S.C. § 17(9)) and Sections 2(d) and 10(a), (e) of the Administrative Procedure Act (5 U.S.C. §§ 1001(d), 1009(a), (e)) are set forth in the Appendix to this brief.

STATEMENT

Petitioner is a common carrier by rail and is subject to the regulatory provisions of Part I of the Interstate Commerce Act. 49 U.S.C. § 1 *et seq.* In 1941 and 1942 petitioner transported for the United States seventy-five interstate shipments of iron and steel articles. The shipments were intended for export through the port of New York but were not there exported due to war conditions. Two sets of rates then filed and effective were potentially applicable to the shipments in question: lower "export rates" and higher "domestic rates". The United States was billed, and made payment, on the basis of the domestic rates. Subsequently, purporting to act pursuant to § 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U.S.C.

§ 66, the United States deducted from other freight charges due petitioner the difference between the export rate and the domestic rate as to each of the shipments, taking the position that the domestic rates were inapplicable to the shipments and that if applicable they were unreasonable insofar as they exceeded the export rates (R. 8-17).

Petitioner sued in the Court of Claims, 28 U.S.C. § 1491, seeking to recover this difference, which amounted to $7,237.87 (R. 3). After trial to a Commissioner and argument before the Court of Claims, that Court on April 3, 1957 held, citing *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, that the doctrine of primary jurisdiction required it to suspend the proceedings before it "pending a determination by the Interstate Commerce Commission as to the proper charges to be applied to the shipments . . ." The Court's order further provided that proceedings should be instituted by the United States before the Commission within 60 days (R. 17-18).

In accordance with this order of suspension, the United States on May 28, 1957 filed in the Interstate Commerce Commission a petition which asserted that the United States was entitled to charges based upon the export rates from the various points of origin to New York and that charges based upon the domestic rates from the various points of origin to New York would be unreasonable to the extent that they exceeded the export rates from the same points to New York. ICC Docket No. 32187. The case was heard by an Examiner, who on May 5, 1958 issued a proposed report finding that the domestic rates were reasonable as to 12 of the 75 shipments involved but as to the remaining 63 were unreasonable insofar as they exceeded the ex-

port rates. Petitioner's exceptions to the proposed report were overruled by Division II of the Commission on November 12, 1958 (305 I.C.C. 259), and petitioner's petition for reconsideration by the entire Commission was denied on March 4, 1959 (R. 20-30).[1]

On March 23, 1959 the United States filed in the Court of Claims a motion to vacate the order of suspension and for judgment for petitioner in the amount of $1,663.39, the portion of the total recovery sought found by the Commission to have represented reasonable charges (R. 18). Petitioner opposed this motion, asking that the suspension of proceedings in the Court of Claims be continued until petitioner had had an opportunity to file and have determined, in the appropriate District Court, a complaint seeking to set aside and annul the order of the Interstate Commerce Commission (R. 30-31). On April 3, 1959, petitioner filed such a complaint in the District Court for the Eastern District of Pennsylvania, invoking the jurisdiction of that Court under 28 U.S.C. § 1336 and 49 U.S.C. § 17(9)[2] (R. 38-42).

[1] Before the Commission the United States abandoned its position that the export rates were applicable and relied upon the contention that the domestic rates were unreasonable. 305 I.C.C. 259.

The Commission determined that the domestic rates would be unreasonable if applied to the 63 shipments on the ground that there was evidence that shipping space had been arranged for these shipments prior to their movement and that accordingly the shipper had shown due diligence in attempting to comply with the conditions attached to the export rates. The Commission did not hold that the domestic rates were unreasonably high in relation to the services involved.

[2] That complaint alleged that the Commission's order was invalid for the following reasons, among others: That there was no evidence of record that the rates found to be unreasonable were unjust and unreasonable in and of themselves with regard to the services rendered; that the Commission erred in finding that certain rates

The United States opposed petitioner's motion to continue the stay of the Court of Claims proceeding, urging that the order of the Interstate Commerce Commission upon which it relied in its motion for entry of judgment was not reviewable under 28 U.S.C. § 1336 and 49 U.S.C. § 17(9) because it was not in fact an "order" but rather merely an "ancillary step" in a judicial proceeding, and that therefore there was no occasion further to delay the entry of judgment (R. 32-37).

On June 5, 1959, the Court of Claims, without further hearing and without purporting to review the order of the Commission or the administrative record on which it was based, issued an order granting the motion of the United States to vacate the order of suspension, and directing the entry of judgment for petitioner in the amount of $1,663.39 (R. 49-50).[3] The effect of the order was to deny petitioner recovery for the difference between $1,663.39 and $7,237.87, the amount which petitioner sought in the Court of Claims.

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were unreasonable insofar as the rates exceeded a level which was lower than the level which the Commission itself had previously prescribed for transportation of the same commodities from and to the same points; that the Commission's conclusion that certain of the rates were unjust and unreasonable was not predicated upon any evidence or finding that the rates were unjust and unreasonable in and of themselves with regard to the transportation service rendered but rather upon the erroneous assumption that the Commission possesses power to determine that a rate is unjust and unreasonable because of its belief as to the equities of the situation; and that the Commission failed to make findings of basic facts upon which to predicate its conclusions that the charges on certain of the shipments were unjust and unreasonable (R. 38-42).

[3] The time for the United States and the Interstate Commerce Commission to answer the complaint in the Eastern District of Pennsylvania has been extended by agreement of the parties until after this case is finally determined. Should the judgment of the Court of Claims be permitted to stand, the Pennsylvania case will be moot.

The order recited that petitioner's proposal that the proceedings be continued in suspension pending a District Court decision on its petition to set aside and annul the Commission's order contemplated a procedure which the court found "inapplicable here" and cited in support of this statement *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, and *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464.[4] The order further recited that it was made on the basis of the record, "including the determination by the Interstate Commerce Commission" (R. 49-50).

SUMMARY OF ARGUMENT

The order of the Interstate Commerce Commission is a final administrative determination of rights and obligations between the shipper and the carrier from which legal consequences follow. This Court has held that such an order is subject to judicial review. *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125; *United States* v. *Interstate Commerce Commission*, 337 U.S. 426. The fact that the order was made in a proceeding instituted before the Interstate Commerce Commission at the direction of a court does not make the order immune from judicial review. *El Dorado Oil Works* v. *United States*, 328 U.S. 12. That the Commission's order in this case is judicially reviewable is also suggested by the relevant provisions of the Administrative Procedure Act.

The order of the Commission should be reviewed in the manner provided for in Sections 1336 and 1398 of Title 28 of the United States Code. These statutes embody a determination by Congress as to the appro-

[4] Neither of these decisions would appear to be pertinent since neither involved the issue of the reviewability of a Commission order made on referral from a court.

priate method of review of Commission orders. This Court has held that Commission orders should be reviewed in the manner provided for by Congress even if they are entered in a proceeding had on referral from a court. *El Dorado Oil Works* v. *United States*, *supra*.

The only alternative to review pursuant to the provisions of these statutes would be review by the court in which the controversy originally arose. It is, however, established that the Court of Claims has no statutory authority to review an order of the Commission. The same situation would prevail where the original controversy arose in a state court. And even if the referral is made by an United States District Court review of the Commission's order as a part of the original controversy in that court would be inconsistent with the Congressional direction that review of Commission orders should take place in the special and separate proceedings provided for by statute.

ARGUMENT

I. The order of the Commission is subject to judicial review

In deference to the long established rule that the question of the reasonableness and legality of rates under the Interstate Commerce Act falls within the primary jurisdiction of the Interstate Commerce Commission, the Court of Claims directed that the status of the rates here in question should be initially determined in a proceeding brought before the Commission. *Texas and Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 68.

The Commission's order determined the reasonableness and the legality under the Interstate Commerce Act of the rates in issue. The order is final and determinative of the rights of the parties under the Interstate Commerce Act save only as it may be enjoined, set aside, annulled or suspended by a court of competent authority acting in conformity with the standards of judicial review established by the decisions of this Court. The Government itself took the position in the Court of Claims that the Commission's action "for all practical purposes determines the outcome of the present suit".[5]

As a final administrative determination of rights and obligations between the shipper and the carrier from which legal consequences follow, the Commission's order is subject to judicial review. *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 131, 132, 143; *El Dorado Oil Works* v. *United States*, 328 U.S. 12, 18-19; *United States* v. *Interstate Commerce Commission*, 337 U.S. 426; *Frozen Food Express* v. *United States*, 351 U.S. 40.

This Court has held that a final Commission order entered in a dispute between carrier and shipper over the reasonableness of past filed rates under the Interstate Commerce Act is subject to judicial review. *United States* v. *Interstate Commerce Commission*, *supra*. The Commission's order in this case, like that in *United States* v. *Interstate Commerce Commission*, is a final administrative determination in a controversy over the reasonableness of past rates.

Because the order does determine rights and obligations under the Interstate Commerce Act, because legal

[5] Defendant's Motion to Dismiss and Opposition to Plaintiff's Motion to Stay Proceedings (R. 33).

consequences follow from it, and because it is not a mere stage in an incomplete administrative adjudication, the question of its reviewability is not controlled by decisions relating to Commission "orders" found by this Court to have been only abstract declarations or otherwise not to be a final determination of rights and liabilities under the Interstate Commerce Act. Such decisions as *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U.S. 299; *United States* v. *Griffin*, 303 U.S. 226; *Great Northern Ry. Co.* v. *United States*, 277 U.S. 172; *United States* v. *Atlanta, Birmingham & Coast R. Co.*, 282 U.S. 522, and *Shannahan* v. *United States*, 303 U.S. 596, are therefore not in point.

The fact that the order was made in a separate proceeding which was instituted before the Interstate Commerce Commission pursuant to an order of the Court of Claims and was designed to serve as a premise for further action by that Court does not make the order immune from judicial review. *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 63-65; *Far East Conference* v. *United States*, 342 U.S. 570, 574-575; *El Dorado Oil Works* v. *United States*, 328 U.S. 12.

That the Commission's action in this case constitutes a reviewable order is also suggested by the provisions of the Administrative Procedure Act, 5 U.S.C. § 1001 *et seq.* Section 2(d) of that statute (5 U.S.C. § 1001 (d)) provides that the word "order" shall mean the whole or any part of the final disposition, whether affirmative, negative, injunctive or declaratory in form, of any agency in any matter other than rule making but including licensing. And Section 10 of the statute (5 U.S.C. § 1009) provides that any person suffering legal wrong because of any agency action, or adversely

affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. The decisions of this Court which establish that the Commission's order is reviewable are therefore confirmed by the provisions of this statute, which this Court has described as establishing a "general legislative pattern of administrative and judicial relationships". *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 433-434, n. 4. And see *United States* v. *Jones*, 336 U.S. 641, 672.

II. The Commission's Order Should Be Reviewed in the Manner Provided for in Sections 1336 and 1398 of Title 28 of the United States Code

Petitioner in this case sought judicial review of the Commission's order by bringing an action to set aside and annul the order in the United States District Court for the Eastern District of Pennsylvania, invoking the jurisdiction of that Court under 28 U.S.C. § 1336 and 49 U.S.C. § 17(9). The former section provides that except as otherwise provided by Act of Congress "the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission". Venue was laid in the Eastern District of Pennsylvania in accordance with Section 1398 of Title 28, which provides that any civil action to enforce, suspend or set aside an order of the Interstate Commerce Commission "shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action".

The procedure followed by petitioner in seeking judicial review was appropriate and proper under the con-

trolling statutes and the decisions of this Court. Since the Commission's order is reviewable it follows that it should be reviewed in accordance with the statutory plan that Congress has provided for review of Commission orders.[6]

The decision of this Court in *El Dorado Oil Works v. United States*, 328 U.S. 12, is decisive on this question. In that case, as here, the issue involved concerned the legality of past charges of a carrier subject to the provisions of the Interstate Commerce Act. There, as here, the issue was first raised as a defense to a suit in a court for monetary recovery. There, as here, the court proceedings were suspended pending the institution and determination of a proceeding in the Interstate Commerce Commission. There, as here, the order of the Commission was declaratory in form and was

[6] The question whether an order made by the Interstate Commerce Commission in an independent proceeding instituted on referral from a court is reviewable under 28 U.S.C. § 1336 has arisen in at least six cases in the district courts. In two reported cases it has been held that such an order is reviewable under 28 U.S.C. § 1336. Davidson Transfer & Storage Co., Inc. v. United States, 164 F. Supp. 571 (D. Md. 1958); Eastern Freight-Ways, Inc. v. United States, 170 F. Supp. 848 (D. N.J. 1959). The same result was reached in an unreported case, Harris Foundry & Machine Co. v. United States, CA 394, M.D. Georgia, 1957. In two unreported cases the courts held or assumed that the order was not reviewable under 28 U.S.C. § 1336. See United States v. Interstate Commerce Commission, CA 1057-58, D. D.C., 1958, and United States v. Chesapeake & Ohio R. Co., CA 1477, E.D. Va., 1959. The issue has been raised but not decided in United States v. Interstate Commerce Commission, CA 649-58, D. D.C., 1958.

In at least four of these cases (Davidson, Eastern Freight-Ways and the two cases in the District of Columbia) the United States has taken the position that the Commission's order is reviewable under 28 U.S.C. § 1336. The Interstate Commerce Commission has consistently taken the position that the order is not so reviewable.

designed to serve as a premise for further action in the court in which the original suit was pending. This Court held that the order should be reviewed in an independent proceeding brought under the provisions of the statutes that govern review of orders of the Interstate Commerce Commission instead of being reviewed by the referring court.[7] See also *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 151, n. 11; *Far East Conference* v. *United States*, 342 U.S. 570, 577.

The only alternative to judicial review pursuant to the applicable provisions of the Judicial Code would be judicial review by the court in which the controversy originally arose. In the instant case, however, the Court of Claims has no statutory authority to review or to annul or suspend an order of the Commission. *United States* v. *Jones*, 336 U.S. 641, 651-653, 666-672. Its jurisdiction is confined to rendering a

[7] In El Dorado this Court held that it was proper for the order to be reviewed by a District Court of three judges convened pursuant to the statutory provisions now found in Sections 2321 and 2325 of Title 28. That case was decided before United States v. Interstate Commerce Commission, 337 U.S. 426, 441-443, in which this Court held for the first time that a Commission order which involved only the question of the payment of money did not raise questions of general importance and hence should be reviewed by a single-judge District Court. Furthermore, it is arguable that the order involved in the El Dorado case had a general significance that transcended the financial controversy between the parties.

Petitioner's suit in the Eastern District of Pennsylvania was brought before a single-judge District Court pursuant to the standards laid down in United States v. Interstate Commerce Commission, 337 U.S. 426, 441-443 ("The root of the controversy concerns the payment of money damages". *Id.* at p. 443). And see Davidson Transfer & Storage Co., Inc. v. United States, 164 F. Supp. 571 (D. Md. 1958) and Eastern Freight-Ways, Inc. v. United States, 170 F. Supp. 848 (D. N.J. 1959).

money judgment by way of relief against the United States. Thus, if the Court of Claims should determine that the Commission's order was vitiated by error of law or that the findings of fact on which the order rests are not supported by substantial evidence in the record as a whole, the Court of Claims would have no authority to remand the cause to the Commission for further proceedings. *Id.* at p. 671. And the Court of Claims, like any other court, has no authority to revise a Commission determination as to the reasonableness of rates. Although the Court of Claims wrote no opinion in this case its order shows on its face that the Court recognized the limitations on its own authority and did not even attempt to review the Commission's order.

There are, moreover, instances in which carriers or shippers may bring suits in state courts to enforce obligations imposed by tariffs or otherwise arising under the provisions of the Interstate Commerce Act. See, for example, *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134; *Great Northern Ry. & Co.* v. *Merchants Elevator Co.*, 259 U.S. 285; *Southern Pacific Co.* v. *Wheaton Brass Works*, 5 N.J. 594, 76 A.2d 890 (1950), *cert. den.* 341 U.S. 904 (1951); *Atlantic Coast Line R. Co.* v. *Wannamaker Chemical Co.*, 57 S.E.2d 311 (S.C. 1950); *Erie R. Co.* v. *Brainard*, 76 N.Y.S.2d 74 (App. T. 1947); *New York Central R. Co.* v. *City of Chicago*, 332 Ill. App. 583, 76 N.E.2d 2000 (1947); *Marony* v. *Applegate*, 226 App. Div. 412, 42 N.Y.S.2d 768 (1943).

If in such a case questions arise which fall within the primary jurisdiction of the Interstate Commerce Commission this Court has held that the proceedings should be stayed and the parties remanded to the Commission for a determination of the administrative as-

pects of the questions involved. *Thompson* v. *Texas Mexican R. Co., supra,* at p. 151. Compare *Marony* v. *Applegate, supra,* 226 App. Div. at p. 417, 42 N.Y.S. 2d at p. 775. In the event of such a referral the state court would have no authority to review or to set aside any order made by the Commission. *Thompson* v. *Texas Mexican R. Co., supra,* at p. 151, n. 11. See also *Venner* v. *Michigan Central R. Co.,* 271 U.S. 127; *North Dakota* v. *Chicago & Northwestern R. Co.,* 257 U.S. 485. Accordingly, unless that order were subject to judicial review under Sections 1336 and 1398 of 28 U.S.C. and Section 17(9) of 49 U.S.C., the losing party before the Commission would be subjected to an adverse court judgment without ever having had the opportunity to challenge in any court the administrative determination upon which that judgment rested.

Apart from the peculiar problems that arise in the case of a proceeding in the Court of Claims or in a state court, a general rule that any order entered by the Interstate Commerce Commission in a proceeding instituted pursuant to the direction of a District Court should be reviewed in the original proceeding in that court and not in a separate proceeding brought pursuant to the applicable provisions of the Judicial Code would lead to consequences that are not in harmony with the Congressional plan for review of Commission orders, even though the jurisdiction of the District Courts is not subject to the limitations imposed upon the Court of Claims and state courts. For example, a review by the District Court which made the referral to the Commission might well lead to results in direct conflict with the venue provisions of 28 U.S.C. § 1398, which require that an action to suspend or set

aside an order of the Commission shall be brought only in the judicial district wherein one of the parties bringing the action resides. Furthermore, if the order made by the Commission on referral should be of a kind that is required to be reviewed by a District Court of three judges, convened pursuant to the provisions of 28 U.S.C. §§ 2321 and 2325, review by a single-judge District Court would be inconsistent with these statutory provisions and with the Congressional policy which they embody.[8]

[8] A court case which raises issues with respect to the payment of money may on referral to the Commission lead to a Commission order which has aspects that go beyond the money obligation involved and which should therefore be reviewed by a three-judge District Court. Compare United States v. Interstate Commerce Commission, 337 U.S. 426, with United States v. Interstate Commerce Commission, 352 U.S. 158. Both cases involved the question whether certain railroads should pay the United States an allowance as shipper for certain wharfage and loading services at the port of Norfolk. In the first case the question arose with respect to wholly past transactions covered by a tariff that was no longer in existence. Accordingly this Court held that the Commission's order should be reviewed by a single-judge District Court. In the second case the question arose under a tariff that was still in effect so that the issue related not merely to payments for past transactions but also to the continuing and future obligations of the carriers. Accordingly it was reviewed by a three-judge District Court specially convened under the provisions of Sections 2321 and 2325 of Title 28 (United States v. Interstate Commerce Commission, 132 F. Supp. 34 (D. D.C. 1955)) whose decision was affirmed by this Court.

CONCLUSION

For the reasons stated the judgment of the Court of Claims should be reversed and the case remanded to that Court with directions to stay the proceeding pending a final determination in the case brought by petitioner in the United States District Court for the Eastern District of Pennsylvania.

Respectfully submitted,

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MARCH 26, 1960

APPENDIX

JUDICIAL CODE:

Section 1336, 28 U.S.C. § 1336:

Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

Section 1398, 28 U.S.C. § 1398:

Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

INTERSTATE COMMERCE ACT:

Section 17(9), 49 U.S.C. § 17(9):

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

ADMINISTRATIVE PROCEDURE ACT:

Section 2(d), 5 U.S.C. § 1001(d):

"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than

rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

Sections 10(a), (c), 5 U.S.C. §§ 1009(a), (c):

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.